



## Capitalising on the conceptual divide: access to public and private justice in children's proceedings

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# Capitalising on the conceptual divide: access to public and private justice in children's proceedings

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## Introduction

The basic concept of a public/private divide in law has been used commonly to distinguish between children's proceedings in Northern Ireland, with proceedings involving private disputes among family members seeking some determination in relation to childcare arrangements on the one hand, and proceedings taken by public agencies seeking to protect the welfare of children on the other. Despite this, and aberrating from jurisprudence on the public/private divide in law generally,<sup>2</sup> children's proceedings emanate from a distinctive statutory framework which overtly unifies many elements of public and private law. Moreover, the crossover between public and private law measures in many proceedings taken under that framework in practice compounds the difficulties in describing their relationship dichotomically. Thus, much of the debate on the nature of the divide and on rules relating to the exclusivity of proceedings does not apply with equal force in this context.<sup>3</sup> For the purposes of this paper, the reach of public law has been construed broadly to include all decisions, actions and omissions by emanations of the state which have an influence on the outcome of children's proceedings. The paper does not seek to advance a normative position on the appropriate extent of state involvement in children's proceedings.<sup>4</sup>

It should be noted at the outset that the statutory framework in question, namely the Children (Northern Ireland) Order 1995 (hereinafter the 1995 Order), does not eliminate

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2 *O'Reilly v Mackman* [1983] 2 AC 237, [1982] 3 WLR 1096.

3 For a succinct account of this debate as it relates to Northern Ireland, see Gordon Anthony, *Judicial Review in Northern Ireland* 2nd edn (Hart 2014) ch 2.

4 For the leading analysis of competing views on this subject, see Lorraine M Fox Harding, 'The Children Act 1989 in Context: Four Perspectives in Child Care Law and Policy (I)' (1991) 13(3) *Journal of Social Welfare and Family Law* 179; see also: John Eekelaar, 'Self-Restraint: Social Norms, Individualism and the Family' (2012) 13(1) *Theoretical Inquiries in Law* 75.

all distinctions between public and private law.<sup>5</sup> The position is nuanced, as the first section of this paper seeks to explain. It will advocate the idea of a public/private law spectrum in children's proceedings, in lieu of the arguably inappropriate binary classification used currently. The next section highlights, by way of example, how the binary classification of children's proceedings according to a simplistic public/private divide may operate to the detriment of the legislative aims of the 1995 Order without coherent justification. The example concentrates on proposals made by the second Access to Justice Review commissioned by the Department of Justice for Northern Ireland<sup>6</sup> together with proposals included in a more focused consultation on the scope of civil legal aid carried out by the same Department.<sup>7</sup> Both exercises proposed approaching reform differently for public and private law children's proceedings respectively, akin to an analogous set of proposals adopted by the government of England and Wales in 2012.<sup>8</sup> This paper will suggest that those proposals are based on a flawed understanding of how children's proceedings have been legislatively designed and of their functioning in practice. The relevancy of these flaws is that they appear to be rationalised by the orthodox conception of proceedings which divides them into the public and the private.

It will be concluded that the concept of a public/private divide in children's proceedings is being used to structure and validate cuts to state-funded legal services. It will be suggested that the concept of a public/private divide is a particularly inappropriate framework for understanding children's proceedings in this context, which ought to be displaced by a more accurate spectral model; a model which recognises the varying degrees of public and private law involved in each set of proceedings. It will be argued that, if a spectral model were accepted, proposals for reforming the system of state-funded legal services for children's proceedings would require reconsideration, so long as the level of state involvement in children's proceedings continues to be regarded as a determinative factor in legal services policy-making. This conclusion underlines the importance of unlocking the boundaries of legal thought on the public/private divide insofar as it relates to children's proceedings in Northern Ireland, and the need to research, construct and teach an accurate theoretical framework for understanding those proceedings.

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- 5 The extent to which the almost equivalent Children Act 1989 truly integrates public and private law has been described as 'a matter for continuing consideration', see Richard White, Paul Carr and Nigel Lowe, *The Children Act in Practice* 2nd edn (Butterworths 1995) 289. For a discussion of the arguments for and against substantive integration of public and private law more broadly, see Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999) 248–66. See also Peter Cane, 'Accountability and the Public/Private Distinction' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 247–76. For a more recent analysis of the differences between public and private law values, see David Feldman, 'The Distinctiveness of Public Law' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015) 17–36. For a different modern analysis, suggesting greater commonality between public and private law, see Paul Craig, 'Limits of Law: Reflections from Private and Public Law' in N W Barber, Richard Ekins and Paul Yowell, *Lord Sumption and the Limits of Law* (Hart 2016) 175–92.
  - 6 Department of Justice for Northern Ireland, *Access to Justice Review 2: The Agenda* (September 2014) <<http://www.dojni.gov.uk/index/access-to-justice-review-2-agenda-setting-document.pdf>>; Department of Justice for Northern Ireland, *Access to Justice Review 2: Final Report* (3 November 2015) <[www.dojni.gov.uk/sites/default/files/publications/doj/access-to-justice-review-part-2-report.pdf](http://www.dojni.gov.uk/sites/default/files/publications/doj/access-to-justice-review-part-2-report.pdf)>.
  - 7 Department of Justice for Northern Ireland, *Consultation Document: Scope of Civil Legal Aid* (October 2014) <<http://www.dojni.gov.uk/index/public-consultations/archive-consultations/scope-of-civil-legal-aid-consultation-final-document.pdf>>; Department of Justice for Northern Ireland, *Post Consultation Report: Scope of Civil Legal Aid* (March 2015) <[www.dojni.gov.uk/index/public-consultations/archive-consultations/post-consultation-report-on-scope-of-civil-legal-aid.pdf](http://www.dojni.gov.uk/index/public-consultations/archive-consultations/post-consultation-report-on-scope-of-civil-legal-aid.pdf)>.
  - 8 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

### Children's proceedings in Northern Ireland

Historically, state intervention in the interests of children's welfare across the UK was once concerned with merely 'conditioning the exercise of paternal/parental rights'.<sup>9</sup> However, notions of the public interest eventually provided the rationale for greater interventionism through social care legislation.<sup>10</sup> This shift was driven to some considerable extent by jurisprudence emanating from the European Convention on Human Rights (ECHR),<sup>11</sup> by the ratification of the UN Convention on the Rights of the Child (UNCRC),<sup>12</sup> by domestic case law,<sup>13</sup> by child abuse cases highlighted in the media,<sup>14</sup> and by various official reviews of the law.<sup>15</sup> The current legislative framework, having been shaped by these varied forces, is a carefully constructed one. It was first enacted in the form of the Children Act 1989 (the 1989 Act) in England and Wales and subsequently in the form of the almost equivalent 1995 Order. The substantive law of Northern Ireland governing children's welfare therefore continues to mirror that developed and implemented in England and Wales to a large extent.

#### UNIFYING LEGISLATIVE PRINCIPLES

The 1995 Order consolidated most provisions of family law affecting the care, upbringing and protection of children in Northern Ireland mainly by making the welfare of children a court's paramount consideration in all proceedings.<sup>16</sup> This paramountcy principle, developed initially in case law,<sup>17</sup> applies regardless of whether a court is invited to determine childcare arrangements by a Trust in so-called public law proceedings or by disputing parents in so-called private law proceedings. The 1995 Order provides a non-exhaustive welfare checklist which comprises seven specific considerations that a court shall have regard to<sup>18</sup> when deciding whether to make, vary or discharge an Article 8 order (generally thought of as private law orders) or an order under Part V (generally thought of as public law orders).<sup>19</sup> It has been held that this provision also satisfies the requirements of Article 8 of the ECHR by ensuring that the order proposed is in accordance with the law, necessary for the protection of the rights and freedom of others,

9 Kerry O'Halloran, *The Welfare of the Child: The Principle and the Law* (Ashgate 1999) 38.

10 Ibid.

11 For a discussion of how the ECHR influenced the relevant legislation despite failure by the UK government to incorporate it until the passage of the Human Rights Act 1998, see Kerry O'Halloran, *Family Law in Northern Ireland* (Gill & Macmillan 1997) 222–23.

12 The UK signed the Convention on 19 April 1990, ratified it on 16 December 1991, and it came into force on 15 January 1992. While it has yet to be incorporated into domestic law, Lord Kerr of the UK Supreme Court recently made dissenting remarks suggesting that it should nonetheless be considered directly enforceable in domestic law, see *R (SG and Others) v Secretary of State for Work and Pensions* [2015] UKSC 16, [255]–[256]. Lady Hale delivered a different opinion with similar effect, holding that the court should have regard to the UNCRC as an aid to the construction of the ECHR, see *ibid* [218], referring to *Burnip v Birmingham City Council* [2012] EWCv Civ 629, [21] (Maurice Kay LJ). For a discussion of constitutional issues raised by Lord Kerr's unorthodox approach to the UNCRC, see Conor McCormick, 'Debating Constitutional Dualism' (UK Constitutional Law Association Blog, 24 November 2015) <<http://ukconstitutionallaw.org/2015/11/24/conor-mccormick-debating-constitutional-dualism/>>.

13 Most notably *Gillick v West Norfolk and Wisbech* [1985] 3 All ER 402, as discussed in O'Halloran (n 11).

14 O'Halloran (n 11) 224–25.

15 Most notably the 1985 Review of Child Care Law which led to *The Law on Child Care and Family Services* (Cmd 62 1987) and the Law Commission's *Review of Child Law: Guardianship and Custody* (Law Com No 172 1988).

16 Children (Northern Ireland) Order 1995, Article 3(1).

17 *J v C (An Infant)* [1969] UKHL 4, [1969] 2 WLR 540.

18 Children (Northern Ireland) Order 1995, Article 3(3).

19 Ibid Article 3(4).

and proportionate.<sup>20</sup> However, the primary legislative intent behind the checklist was to help promote consistency in decision-making and to improve the overall coherence of the law affecting children.<sup>21</sup>

Alongside the welfare principle and its concomitant checklist, the same set of general principles apply to children's proceedings. Perhaps the most important of these is the concept of parental responsibility,<sup>22</sup> defined as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.<sup>23</sup> This concept acts as an important counterbalance to state interventionism that might otherwise be stimulated by the welfare principle and, by replacing the concepts of parental rights and duties which applied previously, it loosely implies that parental authority can only be used legally for the benefit of the child.<sup>24</sup> It also enables parental authority to be temporarily discharged by persons or bodies other than a parent. In this latter respect, the concept is reframed in a way which 'allows it to now play a more consistent role in both public and private family law'.<sup>25</sup> The concept of parental responsibility is supplemented by a duty imposed on public authorities to promote the upbringing of children by their families insofar as it is possible to do so while safeguarding and protecting children's welfare; a duty which signifies a statutory presumption in favour of kinship care.<sup>26</sup> This approach furthers the idea of shared responsibility for children's welfare as between the state and children's parents – the public sphere and the private sphere – albeit that responsibility is intended to rest primarily with children's parents.

The 1995 Order also enacts a no-order principle favouring non-intervention by courts in the absence of evidence showing that the making of an order, be it public or private, will improve a child's welfare.<sup>27</sup> Similarly, the legislation requires that courts shall have regard to the general principle that any delay in determining the question before them is likely to prejudice the welfare of the child,<sup>28</sup> and enables courts to prevent further and unnecessary litigation at odds with a child's welfare by requiring leave before further applications can be made – again regardless of whether those questions or applications sound in public or in private law.<sup>29</sup> It is therefore clear that these principles, consistent with

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20 *Re H (Contact Order) (No 2)* [2002] 1 FLR 22, 37 (Wall J).

21 O'Halloran (n 11) 237.

22 Children (Northern Ireland) Order 1995, Articles 5–7.

23 Ibid Article 6(1).

24 O'Halloran (n 9) 82. Some have argued that the concept of parental responsibility has been systematically diluted by way of judicial interpretations of the statutory provision in England and Wales since its initial enactment in the 1989 Act. See Peter G Harris and Robert H George, 'Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations' (2010) 22 *Child and Family Law Quarterly* 151.

25 O'Halloran (n 9). However, it has been highlighted that, despite a single definition of parental responsibility, in reality decision-making by Trusts is constrained in a way which does not apply to parents. See Brigid Hadfield and Ruth Lavery, 'Public and Private Law Controls on Decision-Making for Children' (1991) 13(6) *Journal of Social Welfare and Family Law* 454.

26 Children (Northern Ireland) Order 1995, Article 18(1).

27 Ibid Article 3(5). It has been suggested that the use of this presumption, among others, has been rejected by the courts of England and Wales and (commendably) substituted with individual assessments of what children's welfare demands in a particular case. See Jonathan Herring and Oliver Powell, 'The Rise and Fall of Presumptions Surrounding the Welfare Principle' (2013) 43(5) *Family Law* 553, 557–58.

28 Children (Northern Ireland) Order 1995, Article 3(2). Note that in the absence of any real sanctions for delay this principle is aspirational and nothing more.

29 Ibid Article 17(14). Courts are guided by a range of factors when deciding whether or not to make an order of this type. See Jonathan Herring, *Family Law* 6th edn (Pearson Longman 2013) 508–10.

the welfare principle and the concept of parental responsibility, are intended to give equal shape to the discretion afforded to judicial authorities faced with the task of conducting children's proceedings brought either by parents or by Trusts. This 'underlying conceptual unity'<sup>30</sup> reflects the original argument made by the Law Commission in its review preceding the 1989 Act, namely that legal 'consistency, clarity and simplicity' are strong grounds for a combined approach to public and private law which affects children.<sup>31</sup>

#### THE PUBLIC/PRIVATE LAW SPECTRUM IN CHILDREN'S PROCEEDINGS

While the unifying principles outlined above bind together public and private law in the 1995 Order to a significant degree, the legislation does preserve some ostensible distinctions between these spheres when it comes to the types of court orders available. Private law orders are characterised as those which settle a contest between parents in respect of some childcare arrangements. Typical orders will determine, inter alia: with whom a child will reside;<sup>32</sup> whether the person with whom a child resides must allow the child to visit or stay with another person, or for that person and the child otherwise to have contact with each other;<sup>33</sup> any steps which a person with parental responsibility is prohibited from taking,<sup>34</sup> such as removing a child from the jurisdiction;<sup>35</sup> and specific issues that may arise,<sup>36</sup> such as where a child will attend school.<sup>37</sup> Public law orders are characterised as those applied for by a Trust<sup>38</sup> which must satisfy the court that a set of threshold criteria have been met to justify state intervention.<sup>39</sup> The statutory threshold stipulates that there must be reason to believe that a child is suffering, or at risk of suffering, significant harm attributable to a lack of parental care or to the child being beyond parental control.<sup>40</sup> If satisfied that this threshold is overcome,

... the court will then consider whether it is appropriate to make an order, giving effect to the welfare and non-intervention principles enshrined in Article 3 of the 1995 Order, and alert to its duty as a public authority under s 6 of the Human Rights Act 1998 and the right to family life in ECHR Article 8, with the best interests [of the child] the paramount consideration.<sup>41</sup>

Typical orders will require, inter alia: that a child be placed in the care of a Trust<sup>42</sup> (which thereby acquires parental responsibility for the child,<sup>43</sup> without extinguishing the parental

30 Fox Harding (n 4) 180.

31 *Review of Child Care Law: Guardianship and Custody* (n 15) paras 1.10–11.

32 Children (Northern Ireland) Order 1995, Article 8(1).

33 Ibid.

34 Ibid.

35 *Ciaran v Niamb* [2009] NIFam 18, [20] (Gillen J).

36 Children (Northern Ireland) Order 1995, Article 8(1).

37 *Re AB (Specific Issue; Education)* [2008] NIFam 2.

38 The main public bodies involved in children's proceedings in Northern Ireland are the five Health and Social Care Trusts; Belfast, Northern, South Eastern, Southern, and Western. They provide a range of health and social care services under contract with the Regional Health and Social Care Board, while the Department of Health has overall responsibility for implementing the Children (Northern Ireland) Order 1995. The Department of Health was named the Department of Health, Social Services and Public Safety until the recent passage of the Departments Act (Northern Ireland) 2016, s 1(5).

39 See, for example, *In Re M (A Child) (Threshold Criteria – Terminal Illness)* [2015] NIFam 8.

40 Children (Northern Ireland) Order 1995, Article 50(2).

41 *Re C, A Child (Care Proceedings)* [2011] NIFam 9, [80] (McCloskey J). For an overview of the ECHR jurisprudence applicable in this context by virtue of the Human Rights Act 1998, see Ciaran White, *Northern Ireland Social Work Law* (LexisNexis 2004) 217–23.

42 Children (Northern Ireland) Order 1995, Article 50(1)(a).

43 Ibid Article 52(3)(a).

responsibility of the child's parents);<sup>44</sup> or that a supervising Trust worker be appointed to advise, assist and befriend a child,<sup>45</sup> who may direct the child to do various things<sup>46</sup> such as to participate in specified activities.<sup>47</sup> These care and supervision orders can also be issued on an interim basis<sup>48</sup> where the court is satisfied that there are 'reasonable grounds' for believing that the threshold criteria for making a full order are met.<sup>49</sup>

While this binary description of court orders is alluringly clear, it fails to capture the reality of how public and private law intersect commonly in proceedings where applications are made for one category of court order or the other, whether by a Trust or by a parent. It is suggested that, in discussing the nature of state involvement in children's proceedings, a spectral view should be promulgated instead. Examples for six different points on the proposed spectral model are provided below – ranging from purely private law proceedings to purely public law proceedings – which are intended to highlight the folly in classifying proceedings dichotomically. This model expands on the research of Andrew Bainham, who has highlighted the hybrid nature of many children's proceedings in England and Wales.<sup>50</sup> Bainham's insights apply with much force in Northern Ireland too, as the examples and citations below seek to demonstrate. It should be emphasised that the variability of intersection between public and private law in each set of children's proceedings makes the decision to identify six points on the proposed spectral model an arbitrary one taken only in the interests of written exposition.

### Purely private law proceedings

Purely private law proceedings lie at one end of the spectrum. These are exemplified by cases involving a dispute between family members who are otherwise unknown to social services. In such cases, proceedings are governed by the welfare principle and there is no need to examine the statutory threshold criteria in order for a court to have jurisdiction to make an appropriate order. Take, for example, the case of a child's parents who are disputing the minutiae of contact arrangements and no agreement can be reached about them out of court.<sup>51</sup> So long as the court does not believe that either parent is at risk of causing harm to the child, an application of this nature will be decided entirely on the basis of the welfare principle and absent the involvement of any public authorities. Unfortunately, there is no data available at present to illustrate the (in)frequency of such proceedings.

### Private law proceedings containing public law elements

Then there are private law proceedings containing public law elements.<sup>52</sup> Three examples are specified below.

First, there are cases which involve the commissioning of an Article 4 report.<sup>53</sup> These arise where the court, often acting of its own volition, requires the relevant Trust to arrange for a suitably qualified person, who is invariably a social worker, to report to the

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44 Ibid Article 5(5).

45 Ibid Article 54.

46 Ibid Schedule 3.

47 Ibid Schedule 3, para 2(1)(c).

48 Ibid Article 57(1).

49 Ibid Article 57(2).

50 Andrew Bainham, 'Private and Public Children Law: An Under-Explored Relationship' (2013) 25(2) *Child and Family Law Quarterly* 138.

51 Ibid 156.

52 Ibid 140–41.

53 Children (Northern Ireland) Order 1995, Article 4.

court any identifiable welfare needs undisclosed by the disputing parties to private law proceedings.<sup>54</sup> They can be triggered by obvious animosity between the parties which causes concerns to be raised about the nature of care being given to the children.<sup>55</sup> For instance, consider the seemingly private law dispute in *Re H and P* between the father and maternal uncle of children whose mother had once lived with the maternal uncle, but had since died.<sup>56</sup> The father sought, *inter alia*, to displace a residence order in respect of the children that would change their residence from the maternal uncle's abode to the father's abode, while the maternal uncle opposed this application and instead proposed shared residence between himself and the father.<sup>57</sup> In deciding the application in the father's favour, Stephens J made specific reference to the Article 4 report of a Trust which had 'had concerns as to child protection issues' involved in the private law proceedings.<sup>58</sup> The report expressed support for the father's application, suggesting that the standard of care provided by the father was 'very appropriate both physically and emotionally'<sup>59</sup> and that a shared residence order would be inappropriate given the distrust in existence between the parties which was submitted as contrary to the children's needs for stability and security. The persuasive power of the Article 4 report in this case illustrates how the mechanism constructs 'a privileged status' or 'a mantle of reliability' extended to certain professionals (such as social workers governed by public law) who, unlike ordinary witnesses in legal proceedings (such as family members governed by private law), are permitted to give their opinion on any matter over which their expertise extends – such as the parenting skills displayed by the parties.<sup>60</sup>

Second, if there is a significant level of concern about children's welfare in private law proceedings, so much so that it appears to the court that a care or supervision order may be appropriate because the children could be suffering or at risk of suffering significant harm, the court may instead direct that the Trust carry out an investigation under Article 56 of the 1995 Order.<sup>61</sup> The Trust must then consider, *inter alia*, whether it should apply for a care or supervision order<sup>62</sup> and provide reasons if it decides not to.<sup>63</sup> Notably, where a direction has been given under Article 56, the court may make an interim care or supervision order with respect to the child concerned if it is satisfied that there are reasonable grounds for believing that the significant harm threshold set out in Article 50(2) is established.<sup>64</sup> White points out that this is the only occasion where the court can make a public law order without an application being made,<sup>65</sup> albeit such orders are interim only. This is perhaps the most extreme form of interventionist public law that can feature amidst nominally private law proceedings. However, the court is powerless to go any further if it disagrees with the Trust's reported findings as it cannot interfere with the Trust's administrative discretion by ordering that public law proceedings be initiated. In *Re O and S*,<sup>66</sup> Gillen J was cognisant of this limitation in finding that the court had no power

54 Kerry O'Halloran, *Child Care and Protection: Law and Practice in Northern Ireland* (Thomson Round Hall 2003) 131.

55 White (n 41) 225.

56 *Re H and P (Residence Application)* [2011] NIFam 16.

57 *Ibid.*

58 *Ibid* [2] (Stephens J).

59 *Ibid* [40] (Stephens J).

60 Michael King and Christine Piper, *How the Law Thinks about Children* (Gower 1990) 45–47.

61 Children (Northern Ireland) Order 1995, Article 56.

62 *Ibid* Article 56(2)(a).

63 *Ibid* Article 56(3)(a).

64 *Ibid* Article 57(1).

65 White (n 41) 247.

66 *Re O and S (Residence Order: Contact: Implacable Hostility)* [2005] NIFam 4.



to institute public law proceedings itself – despite the circumstances of the case involving a mother whose hostility towards her children having contact with their father was held to have constituted emotional abuse and to have satisfied the significant harm threshold.<sup>67</sup> Gillen J deferred so far as to say that the court should not ‘seek in any way to interfere with the professional exercise of the [T]rust’s investigative functions’.<sup>68</sup> Contrarily, Bainham suggests persuasively that there is a case to be made for providing courts with the power to order a Trust to launch public law proceedings, concentrating especially on cases where the court considers that ‘the authority’s unwillingness to issue public law proceedings has been influenced by strategic cost-saving decisions’.<sup>69</sup> Herring has also submitted that, where a public authority becomes aware that a child is suffering serious abuse following a court-ordered investigation, it is under a duty to protect the child by virtue of the Human Rights Act 1998.<sup>70</sup> It might therefore be possible to argue that this duty could be construed so as to require a Trust to apply for a care or supervision order.

Third, courts occasionally make Article 16 family assistance orders in private law proceedings which entail the Trust making a suitably qualified person available, normally a social worker, to ‘advise, assist and (where appropriate) befriend any person named in the order’.<sup>71</sup> This, of course, constitutes a minimalist form of state intervention – an admittedly mild, but patently public law measure. The public nature of the order is minimised by the need for the consent of all parties (including the Trust, excluding the child),<sup>72</sup> but maximised by the need for the circumstances warranting an order to be exceptional (such as where a parent lacks particular skills required to care for the child).<sup>73</sup> These requirements make the order particularly difficult to classify, thus constituting a high-water mark in terms of hybrid public/private law mechanisms found in the 1995 Order.

In summary, public law elements of private law proceedings include court-ordered Trust investigations into children’s general welfare, court-ordered Trust investigations into children’s welfare where the court suspects a care or supervision order may be appropriate, and consensual family assistance orders which cause social workers to become involved in the interests of children’s welfare. Such elements will normally involve a report prepared by the Trust which is likely to carry significant weight in determining relevant private law applications. A Trust’s presence at court during the relevant private law proceedings is also likely and, in many cases, desirable. It has been suggested that the reason why Trusts might seek to exert influence over private law proceedings in this way relates to a reluctance on their part to issue public law proceedings for reasons of cost (both in relation to the legal costs and the costs of maintaining children in care pursuant to a care or supervision order if that proves necessary).<sup>74</sup> Given a statutory preference for kinship care,<sup>75</sup> it is perhaps unsurprising that Trusts should wish to engineer the outcome of private law proceedings to their own contentment wherever possible. They may seek to achieve this by backing a private litigant’s application through any of the mechanisms explored above, in an attempt to

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67 Ibid [17] (Gillen J).

68 Ibid.

69 Bainham (n 50) 151. Bainham makes his suggestion in the context of discussing the Children Act 1989, s 37, which is equivalent to the 1995 Order, Article 56.

70 Herring (n 29) 601.

71 Children (Northern Ireland) Order 1995, Article 16(1).

72 Ibid Article 16(3)(b).

73 Ibid Article 16(3)(a). See, for example, *Re W* [1999] 9 BNIL 40.

74 Bainham (n 50) 141.

75 Children (Northern Ireland) Order 1995, Article 18(1)(b).

arrange a safe outcome for the child without launching public law proceedings and working through the public law threshold requirements that doing so would require. However, this approach is not always successful. For example, in *Re T and P*, Gillen J ordered that, in circumstances where an Article 8 residence order was sought by the father of children whose mother had made significantly harmful unfounded allegations of sexual abuse against him, a care order was more appropriate despite the Trust's support for the father's private law application.<sup>76</sup>

### Private law proceedings converted to public law proceedings

The next point on the public/private law spectrum worthy of discussion concerns private law proceedings which convert completely into public law proceedings. As some of the cases discussed hitherto suggest, this may occur where a Trust decides that the threshold for public law proceedings has been met while a private application is ongoing. Bainham describes how this might arise in practice, in circumstances where a Trust may have been supporting one parent it believed was able to raise the children while guarding against child protection concerns in respect of a second parent:

Let us suppose . . . that the mother is a chronic alcoholic with a record of neglecting the children. The father, on the other hand, is seen as sufficiently able to provide 'good enough' care for the child, having separated from the mother. The authority supports a residence order to the father provided that the mother's contact with the child is heavily circumscribed and initially supervised. Then the authority discovers that, contrary to its expectations, the parents have resumed their relationship, the father is misusing drugs and both parents have been dishonest in their dealings with the allocated social worker. In these circumstances the authority may conclude that 'enough is enough' and issue public law proceedings. The private law case is then consolidated with the public law case, but it is the latter which will now be the dominant application before the court. Private has turned public.<sup>77</sup>

It should be noted that, consistent with the spectral view of children's proceedings advocated herein, in order for private law proceedings to convert into public law proceedings there will normally be some varying degree of Trust involvement in the private law proceedings to begin with. This much belies any notion of a clear divide between the private and public law measures at play in such proceedings.

### Purely public law proceedings

At another point on the spectrum there are children's proceedings featuring no recognisable elements of private law which could rightly be classified as being matters of purely public law. This is most obviously the case in care order applications involving serious non-accidental injuries to children where there are no alternative carers available or suggested by the parents and the only option is therefore long-term substitute care.<sup>78</sup>

### Public law proceedings containing private law elements

Just as there can be private law proceedings with public law elements, sometimes public law proceedings can contain private law elements. For balance, three examples of this nature are specified below.

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<sup>76</sup> *Re T and P* [2001] 9 BNIL 32.

<sup>77</sup> Bainham (n 50) 142.

<sup>78</sup> *Ibid* 156.

First, under the 1995 Order the National Society for the Prevention of Cruelty to Children (NSPCC) and any of its officers are explicitly included within the legislative definition of ‘authorised persons’ who may apply for a care or supervision order.<sup>79</sup> Given that the NSPCC is a privately founded charity, incorporated by royal charter in 1895, it might be thought unusual that the organisation has been empowered to intervene in private family lives with state permission – especially when there are now dedicated public bodies in existence for this purpose. It is also notable that the organisation’s trustees describe one of its purposes as ‘to prevent the public and private wrongs of children’ on the register of the Charity Commission.<sup>80</sup> White highlights rightly that this is explicable by reference to the historical development of the child protection regime across the UK, which was once driven by a philanthropic effort rather than by the state.<sup>81</sup> The associated difficulties involved in classifying the NSPCC using a public/private dichotomy are well demonstrated by *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, wherein the House of Lords decided, following a series of overturned appeals below it, that the NSPCC could rely on ‘public interest immunity’ to justify its refusal to disclose details about the identity of its informants as regards the ill-treatment and/or neglect of children. This decision was reached by analogising the purposes of the NSPCC with those of widely recognised public authorities such as the police. Nonetheless, as under the orthodox view it remains a privately constituted organisation, the unique powers of the NSPCC to apply for nominally public law orders represent yet another iteration of the intersection between public and private spheres in legal proceedings affecting children’s welfare in this jurisdiction, although such applications will, of course, be of a dominantly public law nature.

Second, by virtue of the welfare checklist discussed above, the court must have regard, *inter alia*, to the range of powers available to it under the 1995 Order in any particular set of proceedings.<sup>82</sup> Thus, as the accompanying guidance to the Order explains, whenever the court is ‘considering whether to make, vary or discharge an order under Part V of the Children Order, it must consider whether a different order from the one applied for might be more appropriate’.<sup>83</sup> Therefore, it is open to the court on an application for a public law care order to decide that the child’s interests would be better served by making a private law residence order in favour of a specified relative.<sup>84</sup> A determination of this sort implicitly removes the need to establish that the public law threshold has been met under Article 50(2).<sup>85</sup> Moreover, the court may also make an Article 8 order as an interim measure when a care application is pending.<sup>86</sup> For example, the court could make a residence order in favour of a specified relative until the date of the hearing in respect of the care order application,<sup>87</sup> though such residence orders must

79 Children (Northern Ireland) Order 1995, Article 49(2)(a).

80 Charity Commission, ‘The National Society for the Prevention of Cruelty to Children’ <<http://apps.charitycommission.gov.uk/Showcharity/RegisterOfCharities/CharityWithPartB.aspx?RegisteredCharityNumber=216401&SubsidiaryNumber=0>>.

81 White (n 41) 235. See also Kathryn Chan, *The Public–Private Nature of Charity Law* (Hart 2016, forthcoming), where it is argued that charity law itself is best understood as a hybrid legal tradition.

82 Children (Northern Ireland) Order 1995, Article 3(3)(g).

83 Children (Northern Ireland) Order 1995: Guidance and Regulations: Volume 1: Court Orders and Other Legal Issues, para 5.53.

84 *Ibid.*

85 *Ibid.*

86 Children (Northern Ireland) Order 1995, Articles 11(3) and 11(7)(c); Children (Northern Ireland) Order 1995: Guidance and Regulations (n 83) para 5.54.

87 Children (Northern Ireland) Order 1995: Guidance and Regulations (n 83) para 5.54.

be accompanied by an interim supervision order unless the court is satisfied that the children's welfare will be safeguarded without one.<sup>88</sup> In those circumstances, the court can regulate the child's contact with his or her parents during the interim period by making a contact order.<sup>89</sup> Alternatively, the court can prevent contact altogether prior to the hearing by means of a prohibited steps order.<sup>90</sup>

The case of *Re F and T* provides a clear example of this phenomenon in practice, where Stephens J delivered a provisional judgment granting private law residence orders consecutive to interim care orders put in place until it was discerned whether the mother's agreement would be received in respect of certain 'precautions' which the judge included in an appendix to his judgment.<sup>91</sup> The precautions to which the mother was asked to agree (which were, in effect, *preconditions* on which the private law orders depended) ranged from agreeing to surrender her child's passports, to arranging mental health support, to agreeing to work openly and honestly with social services.<sup>92</sup> The court therefore adjourned further consideration of any final public law care or supervision orders, while making the interim care orders mentioned above, in order to provide the mother with an opportunity to confirm that her children's welfare would be ensured by the making of private law orders with public law conditions attached. It appears inappropriate to claim that these proceedings fall on any one side of a public/private law divide, as they seem to be an intertwined hybrid of both.

Third, where a public law care plan is drawn up in favour of a child's family member which is contested by another family member, for example, where a parent contests a guardianship order in favour of a grandparent, the final hearing can end up taking place under the guise of public law proceedings when they are in fact a contest between private parties. Bainham memorably describes this sort of scenario as 'a private law dispute under a public law umbrella'.<sup>93</sup>

In summary, private law elements of public law proceedings include the power of a private charity to initiate public law proceedings; the availability of so-called private law orders to the court in public law proceedings (sometimes on an interim and/or concurrent basis); and the occurrence of contests between private individuals under a public law umbrella in circumstances where there is disagreement about the provisions made in a care plan.

### Public law proceedings converted to private law proceedings

Finally, there are public law proceedings which convert completely into private law proceedings. If the existence and risk of significant harm to a child has been dealt with to the satisfaction of the relevant Trust and the court, public law cases will almost inevitably conclude 'either in the child remaining with or returning to a parent, or being entrusted to a relative'.<sup>94</sup> Thereafter, on the expiry of any concurrent supervision order which may have been made as a transitional measure, further disputes between family members will be dealt with directly through private applications by those affected.<sup>95</sup>

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88 Children (Northern Ireland) Order 1995, Article 57(3).

89 Children (Northern Ireland) Order 1995: Guidance and Regulations (n 83) para 5.54.

90 Ibid.

91 *Re F and T (Care Proceedings: Residence)* [2011] NIFam 1, [98]–[100] (Stephens J).

92 Ibid Schedule of Precautions (Stephens J).

93 Bainham (n 50) 142.

94 Ibid 143.

95 Ibid.

The crossover between public and private law measures in children's proceedings illustrated by these examples, together with the unifying legislative principles enshrined by the 1995 Order, show the difficulties in speaking of a public/private divide in this context. Using a conceptual divide as the framework for distinguishing proceedings is only useful to the extent that it accurately describes the involvement of the state in determining the outcome of those proceedings. That is to say, defining and labelling one set of legal proceedings 'public' and one set 'private' is only justified if the differences in state involvement between them are clear and meaningful, thus rendering separate designations useful. By thinking about the level of state involvement as spectral in nature, it becomes difficult to determine where the critical point which marks the separation between spheres on the gradient of public/private law might defensibly lie. Therefore, as a matter of jurisprudence, the mismatch between terms used to describe children's proceedings and the actual nature of those proceedings appears to be unsatisfactory. However, as the following section will explain, it can become a matter of significant practical importance too when considered in the context of state help towards access to justice.

### Capitalising on the conceptual divide

State-funded civil legal services are part of a volatile area of law in Northern Ireland. This section begins by outlining the current legislation in conjunction with a brief assessment of the pertinent distinctions and commonalities between rules for state-funded civil legal services applications in relation to so-called public and private law children's proceedings. It then examines some further reform proposals which, it is argued, are problematised by the spectral model for considering children's proceedings advocated above. This discussion will lead to the conclusion that a new way of thinking is necessary in relation to how the system of accessing justice through children's proceedings might be reformed.

#### CIVIL LEGAL SERVICES

Both civil and criminal legal aid used to be governed primarily by the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (hereinafter the 1981 Order) and, indeed, most applications signed before 1 April 2015 continue to be governed by it.<sup>96</sup> But, by the commencement of the Legal Aid and Coroners' Courts Act (Northern Ireland) 2014 (hereinafter the 2014 Act), the functions and staff of the Northern Ireland Legal Services Commission (NILSC) transferred to an executive agency of the Department of Justice called the Legal Services Agency Northern Ireland (LSANI) and the legislation governing civil legal aid transferred from the 1981 Order to the Access to Justice (Northern Ireland) Order 2003 (hereinafter the 2003 Order).<sup>97</sup> Civil legal aid has since become known as civil legal services.<sup>98</sup> In order to commence civil legal services, a suite of subordinate legislation has been made,<sup>99</sup> exercising powers conferred on the Department of Justice by the 2003 Order which were vested in it in 2010.<sup>100</sup>

96 Access to Justice (2003 Order) (Commencement No 7, Transitional Provisions and Savings) Order (Northern Ireland) 2015, Article 3(1).

97 Legal Aid and Coroners' Courts (2014 Act) (Commencement No 1) Order (Northern Ireland) 2015.

98 Access to Justice (Northern Ireland) Order 2003, Article 10(1).

99 Civil Legal Services (General) Regulations (Northern Ireland) 2015; Civil Legal Services (Financial) Regulations (Northern Ireland) 2015; Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015; Civil Legal Services (Costs) Regulations (Northern Ireland) 2015; Civil Legal Services (Cost Protection) Regulations (Northern Ireland) 2015; Civil Legal Services (Statutory Charge) Regulations (Northern Ireland) 2015; Civil Legal Services (Remuneration) Order (Northern Ireland) 2015; Civil Legal Services (Disclosure of Information) Regulations (Northern Ireland) 2015.

100 Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Schedule 17, para 53.

This legislation governs, for the most part, applications for state funding to support individuals who are taking, defending or party to both so-called public and private children's proceedings. There is a mandatory 'merits test' which must be satisfied,<sup>101</sup> requiring that there must be reasonable grounds for the applicant to be involved in the relevant proceedings,<sup>102</sup> as well as financial eligibility requirements – which are sometimes referred to as a 'means test' – establishing an allowable limit on the assessable income and capital of an applicant for civil legal services.<sup>103</sup> Since the commencement of the new rules on 1 April 2015, there are three types of civil legal services for cases which fall within scope. First, there is 'Legal Advice and Assistance' through which funding can be provided for advice or assistance on any matter of law up to a cost of £88, including all children's proceedings. Further work in excess of £88 is subject to the prior authority of LSANI.<sup>104</sup> Second, there is 'Representation Lower Courts'. A funding certificate of this kind would be appropriate if funding for representation is required for children's proceedings commenced in a Magistrates' Court, a Family Proceedings Court or a Domestic Proceedings Court.<sup>105</sup> Third, there is 'Representation Higher Courts'. A funding certificate of this kind would be appropriate if funding for representation is required for children's proceedings commenced in a County Court, a Family Care Centre, the Court of Appeal in Northern Ireland, or the Supreme Court of the UK.<sup>106</sup>

Prior to 1 April 2015, there were special rules in place for some children's proceedings under Article 172 of the 1995 Order, which amended the 1981 Order.<sup>107</sup> The key provision provided that legal aid (as it then was) had to be granted to any parent or person with parental responsibility to cover proceedings relating to an application for: a care or supervision order; a child assessment order; an emergency protection order, or an extension or discharge of an emergency protection order.<sup>108</sup> In such cases, provided the application was completed correctly and accepted by the NILSC (as it then was) as being within the ambit of Article 172, legal aid could not be refused on grounds of means or merits. The orders that were listed under Article 172 are classified as public law orders and were afforded this special treatment because of the assumption that they would necessarily involve a high risk of state interventionism. This assumption grounded the rationale for state-funded legal representation as of right. The same assumption was thought inapplicable to private law proceedings, driven in part by the orthodox conception of public and private law proceedings as being clearly divided between those with and without state involvement. Other so-called public law proceedings which were not listed under Article 172 were considered on a case-by-case basis by the application of means and merits tests consistent with applications relating to so-called private law proceedings.

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101 Access to Justice (Northern Ireland) Order 2003, as amended by the Legal Aid and Coroners' Courts Act (Northern Ireland) 2014, Article 14(2A).

102 Ibid.

103 Civil Legal Services (Financial) Regulations (Northern Ireland) 2015.

104 Civil Legal Services (General) Regulations (Northern Ireland) 2015, reg 32.

105 Ibid, reg 2.

106 Ibid.

107 Children (Northern Ireland) Order 1995, Article 172.

108 Ibid Article 172(3).

However, Article 172 has been repealed<sup>109</sup> and replaced with a slightly different framework.<sup>110</sup> The new regulations provide similarly that legal services shall be available to children and persons with parental responsibility without reference to their financial resources in, inter alia, applications for the same public law order applications which were covered by the previous regime.<sup>111</sup> The main difference in regimes is that a merits test will now be applied in such applications,<sup>112</sup> as in all other applications not excepted under the relevant regulation,<sup>113</sup> albeit LSANI has confirmed in writing that the merits test ‘will be met in these cases because of the nature of the case’, elaborating only by referring to the ‘the parties with parental rights and the nature of the proceedings’.<sup>114</sup> As a result of LSANI’s somewhat questionably fettered construction of its new discretion, the most recent reforms appear to have had little effect on the privileged status of some so-called public law proceedings in the field of access to justice. The level of state involvement in determining the outcome of proceedings continues to be recognised as a justification for state-funded legal services, with only those proceedings which might be thought of as having a very high propensity for state involvement (i.e. proceedings likely to be at the public end of the public/private law spectrum) benefiting from exceptions in relation to financial eligibility requirements.

#### FURTHER PROPOSALS TO REFORM CIVIL LEGAL SERVICES

The Department of Justice for Northern Ireland has considered further reforms to civil legal services in children’s proceedings in at least two of its recent public consultations. Some of the proposals made in each consultation are discussed below, followed by a brief critique of their shared assumptions.

First, the second Access to Justice Review (the Review), launched in September 2014<sup>115</sup> and reported on in November 2015,<sup>116</sup> was fundamentally driven by the goal of developing a vision for the future of publicly funded legal services in Northern Ireland during a difficult economic climate. In particular, it sought to prioritise those services where publicly funded advice and/or representation should be provided in order to meet human rights obligations, safeguard the interests of the vulnerable and meet the wider public interest.<sup>117</sup> The Review invited comment on a broad range of proposals, but the most pertinent for present purposes were as follows. It was suggested that the provision of legal services in respect of public law children cases might be regarded as ‘part of the irreducible minimum of service provision’.<sup>118</sup> In contrast, consideration was given to removing private family law from the scope of legal services except where there is objectively verifiable evidence that domestic violence or child abuse may be at stake,

109 Access to Justice (Northern Ireland) Order 2003, Article 49(2), repeals the statutory provisions specified in Schedule 5 to the extent specified in col 3 of that schedule. The Children (Northern Ireland) Order 1995 is listed in Schedule 5, with Article 172 included in col 3. This provision was commenced by the Access to Justice (2003 Order) (Commencement No 7, Transitional Provisions and Savings) Order (Northern Ireland) 2015, Article 2.

110 Civil Legal Services (Financial) Regulations (Northern Ireland) 2015.

111 Ibid reg 4(1)(d)(i)(aa)–(dd).

112 Access to Justice (Northern Ireland) Order 2003, as amended by the Legal Aid and Coroners’ Courts Act (Northern Ireland) 2014, Article 14(2A).

113 Civil Legal Services (Financial) Regulations (Northern Ireland) 2015, reg 4.

114 Email from the Legal Services Agency Northern Ireland to author (2 October 2015).

115 *Access to Justice Review 2: The Agenda* (n 6).

116 *Access to Justice Review 2: Final Report* (n 6).

117 *Access to Justice Review 2: The Agenda* (n 6) para 1.1.

118 Ibid para 5.5.

based closely on the reforms introduced in England and Wales in 2012.<sup>119</sup> The agenda for the Review noted the criticism which has followed the 2012 reforms in general terms<sup>120</sup> and the final report cited some of its many detailed critiques.<sup>121</sup> By way of example, some criticism of the regime has been dispensed by the judiciary of England and Wales. In a recent case about contact arrangements and specific issues relating to education and health, involving litigants who would have been entitled to legal services before the 2012 reforms, Mostyn J held that it was impossible for the relevant parties to be expected to represent themselves having regard to the factual and legal issues at large.<sup>122</sup> He said that to do so ‘would be a gross inequality of arms, and arguably a violation of their rights under Articles 6 and 8 of the European Convention on Human Rights and Article 47 of the European Charter of Fundamental Rights’.<sup>123</sup> The agenda for the Review also countenanced an expanded role for mediation in private family disputes, together with ways of limiting the provision of legal services in cases involving repeated applications to the court.<sup>124</sup>

Surprisingly, the final report of the Review recommended that *all* applications for legal services should be merits tested, even those relating to so-called public law proceedings, because in some circumstances, the report suggests, parents may not be considered a serious or high priority for funding (for example, ‘an estranged parent who has hitherto shown little interest in the children or the proceedings’).<sup>125</sup> Nonetheless, so-called public law proceedings remain privileged by the recommendations, as they suggest that the proposed eligibility test ‘should be specific to public law proceedings’ and ‘should not include prospects of success criteria’,<sup>126</sup> which are recommended in relation to so-called private law proceedings. The proposal to remove so-called private law proceedings from the scope of legal services is not recommended, but the aforementioned prospects of success criteria are, together with, *inter alia*, a cost–benefit test;<sup>127</sup> financial conditions designed to encourage earlier dispute resolution;<sup>128</sup> a new form of funding called an ‘Early Resolution Certificate’;<sup>129</sup> and a range of ‘controls’ on long-running contact disputes, designed to make remuneration for such cases ‘significantly less generous than for cases which resolve early’.<sup>130</sup> Much more ‘significant’ use of family mediation is also recommended alongside a collection of incentivising reforms.<sup>131</sup> Most radically, a feasibility study on the complete overhaul of so-called public law proceedings is recommended, which would place them in the hands of an inquisitorial tribunal akin to

119 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

120 *Access to Justice Review 2: The Agenda* (n 6) para 5.11.

121 *Access to Justice Review 2: Final Report* (n 6) para 18.3.

122 *MG and JG v JF* [2015] EWHC 564 (Fam), [10] (Mostyn J).

123 *Ibid.* For a second striking example, see *Re K and H (Children)* [2015] EWCA Civ 543.

124 *Access to Justice Review 2: The Agenda* (n 6) paras 5.15–16. It ought to be noted that the Children (Northern Ireland) Order 1995, Article 179(14), already enables the court to prevent further and unnecessary litigation on a matter upon which it has made a ruling. In addition, the director of LSANI now has the power to make a prohibitory direction to deal with unwarranted applications under the Civil Legal Services (General) Regulations (Northern Ireland) 2015, reg 30.

125 *Access to Justice Review 2: Final Report* (n 6) paras 18.17–18.19.

126 *Ibid* paras 18.18.

127 *Ibid* para 18.48. The recommendation specifies that the cost–benefit analysis should be ‘expressed in private client terms’, namely whether ‘a reasonable private paying client would be prepared to pay for the work to be undertaken if they could afford to do so’.

128 *Ibid* paras 18.56–57.

129 *Ibid* paras 18.44–18.52.

130 *Ibid* paras 18.32–18.33.

131 *Ibid* ch 17.



the Children's Hearing system in Scotland.<sup>132</sup> While 'identifying the appropriate jurisdiction' of such a panel is highlighted as an issue for consideration,<sup>133</sup> the final report otherwise fails to acknowledge the difficulties in isolating so-called public law proceedings for reform in the context of the interconnected public and private law measures which have been developed under the 1995 Order. At the time of writing, the recommendations of the report were themselves subject to a public consultation. While the consultation closed on 9 February 2016,<sup>134</sup> its outcomes have not yet been published.

Second, a consultation on the Scope of Civil Legal Aid (the consultation), launched in October 2014<sup>135</sup> and finalised in a post-consultation report in March 2015,<sup>136</sup> was undertaken in order to examine how best to give effect to recommendations arising from the first Access to Justice Review which reported in September 2011<sup>137</sup> and also 'to explore any other changes to the scope of civil legal aid that will help deliver the strategic objective of bringing legal aid expenditure within budget'.<sup>138</sup> The consultation also invited comment on a broad range of proposals, but the most pertinent for present purposes were as follows. Consistent with the initial terms of the Review, although inconsistent with the recommendations of its final report, the consultation document categorically stated that the Department of Justice would not be considering any proposals that would affect *either* 'Special Children Order Proceedings (cases that involve the state taking a child into care and not subject to either a means or a merits test)' – which are now listed under regulation 4 of the Civil Legal Services (Financial) Regulations (Northern Ireland) 2015 – *or* 'other public law children cases which are subject to a means and/or merits test'.<sup>139</sup> The consultation therefore exhibited a foregone determination not to remove from the scope of civil legal aid (as it then was) or to change the existing rules in respect of *any* so-called public law children's proceedings. In contrast, the consultation gave extensive consideration to taking so-called private law children's proceedings out of scope, either entirely or partially. The consultation document highlighted the criticisms arising from analogous reforms in England and Wales, noting a range of detrimental and unforeseen outcomes.<sup>140</sup> Nonetheless, an option to limit multiple private family law applications in the same case (mirroring the Review proposal above), as well as an option to take private children's proceedings entirely out of scope and to fund greater use of mediation in its place, were both proposed by the consultation.<sup>141</sup>

The proposal to remove private cases entirely from scope was abandoned in the end, although it was averred that the issue will be kept under review,<sup>142</sup> following strong opposition from respondents to the consultation who highlighted a drop in the uptake of mediation services in England and Wales since analogous reforms were introduced,

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<sup>132</sup> Ibid ch 16.

<sup>133</sup> Ibid para 16.22.

<sup>134</sup> Department of Justice for Northern Ireland, *Consultation on the Report of the Access to Justice Review Part Two* (3 November 2015) <<https://www.dojni.gov.uk/consultations/report-access-justice-review>>.

<sup>135</sup> *Consultation Document: Scope of Civil Legal Aid* (n 7).

<sup>136</sup> *Post Consultation Report: Scope of Civil Legal Aid* (n 7).

<sup>137</sup> Department of Justice for Northern Ireland, *Access to Justice Review Northern Ireland: The Report* (August 2011) <<http://www.dojni.gov.uk/index/publications/publication-categories/pubs-criminal-justice/access-to-justice-review-final-report.pdf>>.

<sup>138</sup> *Consultation Document: Scope of Civil Legal Aid* (n 7) para 2.1.

<sup>139</sup> Ibid para 10.5.

<sup>140</sup> Ibid para 11.6.

<sup>141</sup> Ibid paras 11.24–25.

<sup>142</sup> *Post Consultation Report: Scope of Civil Legal Aid* (n 7) para 3.29.

alongside a rise in the number of personal litigants.<sup>143</sup> On the other hand, the proposal to limit the number of multiple applications in the same so-called private law proceedings was recommended by the consultation report and it therefore set out an intention to issue guidance to the NILSC (as it then was) to 'tighten up the eligibility test and introduce the presumption that legal aid would be available for limited contact hearings only'.<sup>144</sup> It further noted that the guidance would require an outline of 'the circumstances in which legal aid will no longer be granted, including listing any exemptions'.<sup>145</sup> The Department of Justice hopes to achieve savings of approximately £9 million per annum prospectively as a result of the proposed reforms.<sup>146</sup>

It is clear from both the Review and the consultation that policy on children's proceedings under development by the Department of Justice is being shaped significantly by the problematic orthodox conception of a public/private divide. For example, the extensive exemption of children's proceedings on the public side of this artificial divide from consideration in the context of reforms to publicly funded legal services is problematic to the extent that it fails to recognise how some public law proceedings effectively become private law cases under a public law umbrella. However, the extensive inclusion of children's proceedings on the private side of the artificial divide for consideration in respect of proposals to make budget savings is undoubtedly more concerning. In a case where one parent objects to contact arrangements in favour of another parent, for example, where the favoured parent is the beneficiary of significant support from the relevant Trust, the prospect of a limitation on the number of applications that the disadvantaged parent can make with the benefit of adequately remunerated legal advice and representation to properly submit those applications after the first several instances seems unlikely to ensure access to justice nor equality of arms. This illustrates how thinking about children's proceedings along the lines of a public/private divide could mask the actual level of state involvement in the outcome of a particular set of children's proceedings, thereby undermining the rationale for subjecting proceedings on one side of the artificial divide to reductions in scope while uncritically preserving the existing scheme in respect of proceedings on the other side. Current orthodoxy may in this way allow the state to capitalise on the conceptual divide without coherent justification.

The department's policy approach also raises normative concerns about the consistency at state level regarding the appropriate extent of the state's role in family law disputes.<sup>147</sup> While such concerns lie outside the remit of this paper's focus, it is

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143 For an excellent review of the implementation of civil legal aid reforms in England and Wales since 2012, see National Audit Office, *Report by the Comptroller and Auditor General: Implementing Reforms to Civil Legal Aid* (20 November 2014, HC 784). For academic research on the issues raised by litigants in person, see, for example, Liz Trinder and Rosemary Hunter, 'Access to Justice? Litigants in Person Before and After LASPO' (2015) 45(5) *Family Law* 497; Mavis Maclean and John Eekelaar, 'Legal Representation in Family Matters and the Reform of Legal Aid: A Research Note on Current Practice' (2012) 24(2) *Child and Family Law Quarterly* 223. For further research on the 'slowly increasing use of mediation' as a means of resolving family disputes in England and Wales since 2012, see, for example, Lisa Parkinson, 'Mediation and the Government Response to LASPO' (2015) 45(9) *Family Law* 1021.

144 *Post Consultation Report: Scope of Civil Legal Aid* (n 7) para 3.38.

145 *Ibid* para 4.9.

146 *Ibid* para 4.8.

147 John Eekelaar and Mavis Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart 2013) 206. Eekelaar and Maclean highlight that the Coalition government's legal aid reforms in 2012 betrayed an analogous attitude that suggested so-called private family law disputes were 'for the parties to sort out, and not the concern of the state' while also noting that 'in a strangely inconsistent manner, it imagine[d] that legislation could be important in affecting the extent of parental involvement with children after separation'.

acknowledged that they are gaining increasing attention in the UK and beyond,<sup>148</sup> where discontent about the continued resort to misleading public/private law discourse is growing and calls to discard that dubious distinction are spreading.

### Conclusion

A child's future care, upbringing and protection is at risk in every set of legal proceedings initiated to determine those arrangements, regardless of the level of state involvement in the outcome. Those issues and their resulting impact are not necessarily more or less serious whether the proceedings are classified as public or private, but, if the level of state involvement in determining their outcome is taken to be a factor of importance in deciding whether publicly funded legal advice and representation is justified, then a new framework for evaluating proceedings in that light should be developed to displace the boundaries of legal thought which prevail at present. This paper began by explaining how the legislative design of the 1995 Order was marked by efforts to bridge public and private law by making children's welfare the main organising principle when processing legal proceedings in which they are involved. At this stage it should be clear that further reform proposals in relation to state-funded civil legal services risk inconsistency with these legislative aims insofar as they could entrench the notion of a divide by bifurcating the applicable rules without coherent justification and without regard to the overriding priority otherwise given to children's welfare in legal decision-making processes. It was also suggested that the operation of the 1995 Order in practice has delivered even greater intersection between public and private law than has been appreciated previously, and further suggested that this phenomenon might be better understood by promulgating a spectral model for considering the level of state involvement in children's proceedings. On the basis of that model, it is submitted that the current approach to reforming how justice is accessed in children's proceedings requires reconsideration in an environment free from the constraints on legal thought produced by a problematic public/private dichotomy.

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148 For example, see Bill Atkin, 'Controversial Changes to the Family Justice System in New Zealand: Is the Private Law/Public Law Division Still Useful?' (2015) 29 *International Journal of Law, Policy and the Family* 183.